APPENDIX A

Opinions Below

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

Opinion

Appellant was convicted of the offense of uttering and passing a forged instrument in writing relating to and affecting title to land. His punishment was assessed at confinement in the penitentiary for a term of six years.

Trial was had in the District Court of Hill County, Texas, after a change of venue from the District Court of Travis County, Texas. The cause was heretofore reversed by this court in Sheffield v. State, 307 S.W. 2d 100, because the evidence was insufficient to show that the notary public taking the acknowledgment to the instrument alleged to be false was a duly qualified notary public, and for other reasons set forth in the opinion.

The statutes, Arts. 1006, 1007, and 1008 of the Penal Code, under which appellant was convicted, were held constitutional in the opinion.

Attention being directed to the amendment of Art. 5412m, V.A.C.S., in 1955, by the addition of Sec. 32 prescribing a penalty for the use of any false, fictitious, or forged instrument in writing in connection with or pertaining to any transaction under the Veterans Land Fund Act, the court gave application to the penalty prescribed in said section, the section being enacted by the legislature subsequent to the date of the offense charged against appellant and

prescribing a lesser penalty than that prescribed in Art. 1006, supra.

We find no merit in appellant's contention that in enacting Sec. 32 of Art. 5421m, supra, the legislature repealed Art. 1008, supra. A contrary intention was clearly expressed in Sec. 14 of the later act wherein it was provided that the provisions of the act were to be cumulative of all other laws not in conflict therewith.

The record in this case is perhaps one of the longest with which this court has been confronted. It contains some 3,800 pages. After carefully reviewing the entire record, we find that appellant's primary contention is that the evidence is insufficient to support the conviction. It is his contention that the evidence fails to show that the acknowledgment, as set out in the indictment, was "falsely made" by the notary, Doris Sayles, or that it was made with any fraudulent intent.

Briefly summarizing the testimony, it reflects that the appellant had been engaged in what is known as "block deals" under the Veterans Land Program of this state at Brady, Texas. Appellant and L. V. Ruffin secured applications from qualified veterans, paid them $100 each for the rights under the Veterans Land Program, submitted the application to the Veterans Land Office at Austin, Texas, purchasing the land on the sworn application of these various veterans without the veterans appearing before a notary public to swear to the applications pertaining to the acquisition of the land. The conviction in this cause was had on the transaction involving a veteran by the name of Alfonso G. Mireles. Mireles was a veteran living at Brady, Texas. He went to the office of L. V. Ruffin and signed an application. He testified that he did not read it, that he did not appear before Doris Sayles, that he never talked to her, that he did not want to buy any land, that he had never been in Kinney County, Texas, where the land involved in this transaction is located, that some nine months later he signed

some papers for Mr. Ruffin, that Ruffin gave him a check for $100, that the final contract was acknowledged by Jerrie Rankin but he did not appear before Jerrie Rankin and did not know her.

The testimony of Doris Sayles, substantiated by a copy of the commission from the Secretary of State, adequately reflects that she was a notary public. She testified that Mireles did not appear before her but the acknowledgment reflects that she certified that he did.

The evidence adduced from the testimony of Doris Sayles and Mireles clearly shows that the acknowledgment was falsely made.

Art. 1007, V.A.P.C., which was the applicable statute at the time of the commission of the offense, provides that if any person authorized by law to take the proof of an acknowledgment to any instrument, document, or paper whatsoever, affecting or relating to the title of lands in this state, wilfully and falsely certifies to such proof or acknowledgment duly made, he shall be guilty of forgery. We hold that this article does not require any intent to defraud upon the part of the notary making a false certificate to an acknowledgment. We think the wilful making of a false acknowledgment is a forgery under the terms of the article. Appellant's contention is without merit.

Appellant further contends that the facts and circumstances are not sufficient to show that he was a principal and that there is no evidence that he uttered personally, published, passed, or used the alleged false or forged acknowledgment.

We think it unnecessary to here review the lengthy testimony as to the scheme or system used by appellant, Ruffin, and Bascom Giles in this and other transactions involving the purchase of large blocks or tracts of land and the division of the excess profits from the inflated values with intent to defraud. Suffice it to say that the testimony is more than adequate to establish the appellant as a prin-

cipal in this transaction. Ruffin's testimony shows that appellant knew the applications of the various veterans were in blank. Ruffin testified that he secured more than 100 veterans' signatures to applications, approximately 54 of them being used in this transaction, and that the Rosenow Ranch involved in this transaction was in Kinney County, and Mireles was to get his tract of land out of it. Ruffin's testimony further reflects that appellant suggested that they make different tracts so that it would look better; that appellant got the money from Brady National Bank; that appellant was to pay Ruffin some $20,000 but that appellant said he had to pay Giles $75,000 and that he reduced the amount that Ruffin was to receive.

Appellant testified that Ruffin laid the papers involving the Rosenow Ranch on his desk and talked to appellant's wife and said he wanted Doris to do some work for him; that Doris came in and asked where the papers were and appellant pointed them out to her; that he did not take the applications to Austin; that he did not know the law required the person making the acknowledgment to be present; and that such was not the practice in Brady, Texas.

The testimony of Doris Sayles, who was Mrs. Grover C. Cunningham at the time of this trial, reflects that appellant asked her to come to his office on many occasions in reference to notarizing the applications of veterans and that none of the veterans were ever before her when the acknowledgments were completed. She further testified that when she read of the investigations of the Veterans Land scandals and talked to the appellant that he informed her he would tell them he was responsible.

Appellant's testimony shows that he borrowed the money to make the down payments for the 34 veterans on the Rosenow tract; and that he had quite a few dealings with Bascom Giles, who was the Commissioner of the General Land Office and also shown to be the Chairman of the Veterans Land Board in the State of Texas.

The state's testimony amply reflects many telephone calls from Brady made by the appellant and Ruffin to Giles at Austin and, in turn, numerous calls were made by Giles to appellant at Brady during the time of this and other transactions. The testimony of the state further reflects that the 10,000 acre Rosenow Ranch was purchased by appellant and others for $16 per acre; that the appraiser for the Veterans Land Board first appraised the land at $27 per acre and was later instructed by Bascom Giles to add $5 per acre to the valuation. The state's exhibits show receipts issued to appellant for fifty-four cashier's checks to the Veterans Land Board for the 5% down payment on each loan, plus the fifty-four receipts for cashier's checks for the $50 closing fee on each tract. The state further showed that appellant assigned fifty-one commitments made by the Veterans Land Board to veterans for the land subdivided in the Rosenow Ranch tract to Bankers Life & Casualty Company of Chicago.

While the evidence of Doris Sayles Cunningham and L. V. Ruffin is accomplice testimony, it directly shows that appellant was a principal in this and other transactions. We conclude that the testimony of Mrs. Jerrie Rankin, in addition to the other testimony, is sufficient to corroborate the testimony of these two accomplice witnesses. Cawley v. State, 310 S. W. 2d 340.

The question as to Mireles being an accomplice was submitted to the jury. We do not think the proof shows that he was an accomplice. In our opinion, he was an innocent veteran with little education, looking for an easy one hundred dollar pick up. We hold the evidence sufficient to show appellant to have been a principal throughout the transaction involved. It is unnecessary to corroborate the entire narrative and all of the testimony of an accomplice. Middleton v. State, 217 S. W. 1046. Every constituent element of the offense as testified to by the accomplice need not be corroborated. Williams v. State, 128 S. W. 1120; Shaffer v. State, 52 S. W. 2d 1054. Also, see: Contreras v. State,

162 S. W. 2d 716, which holds that it is not necessary that the corroborating evidence support that of the accomplice to each criminative fact but is sufficient if the corroborating evidence tends to connect the accused with the offense charged.

Appellant strenuously urges by lengthy brief and oral argument that the trial court erred in overruling his objections to the court's charge. The record before us reflects that the trial court filed its first charge at 4:55 p.m. on February 6, 1961, and that the appellant took exceptions and objections to it, embodying some forty-two pages. The court then filed another charge at 9:45 p. m., on February 7, 1961. From this state of the record, it is not entirely clear to us that the appellant excepted and objected to his second or last charge of the court, which was the one read to the jury. We do resolve any doubt in this connection in appellant's favor and adopt his premise that he also made exceptions and objections to the final charge of the court. We do not find, however, that the appellant took exception to the ruling of the court in overruling his exceptions and objections to this charge of the court. In the absence of such exception, appellant's complaint to the charge is not before us for review. Stone v. State, 346 S. W. 2d 323; Eldredge v. State, 284 S. W. 2d 734; Smith v. State, 313 S. W. 2d 291; Redman v. State, 287 S. W. 2d 676; Medlock v. State, 356 S. W. 2d 312. For like reasons, the complaints to the refusal of requested charges are not before us. Medlock v. State, supra, and cases cited.

Appellant next complains that the trial court erred in overruling his motion to quash the indictment. We think this contention is without merit. The indictment in the second count alleged, in substance, that appellant did unlawfully and with the intent to make money and with the intent to defraud, knowingly utter, publish, pass, and use as true and genuine, to the Veterans Land Board of the State of Texas, a certain false and forged acknowledgment to a certain instrument in writing relating to and affecting

title to land, and that when the appellant did utter, publish, pass, and use as true and genuine the said instrument in writing, he well knew that said acknowledgment was false and forged.

The failure to allege how and by whom the acknowledgment was falsely made did not render the indictment insufficient. Uplack v. State, 96 S. W. 2d 979.

Appellant fourthly complains of the action of the trial court in overruling his motion to change venue from Hill County because of local prejudice against him. No affidavits of compurgators in support of the change of venue were filed. A motion for change of venue must be supported by affidavits of at least two compurgators in order to be considered. Philpot v. State, 332 S. W. 2d 323; Methowen v. State, 290 S. W. 2d 521; 77 S. Ct. 1405, 354 U. S. 936; Windham v. State, 288 S. W. 2d 96. This complaint is also without merit.

Appellant's contention that the second count of the indictment shows that it was barred by the three year statute of limitation is without merit. The record shows that the offense was alleged to have been committed on or about the 20th day of May, 1954, and the indictment was returned June 11, 1959. Art. 177, C. C. P. fixes the limitation period for this offense at ten years. By the holding of this court in the first Sheffield case, 307 S. W. 2d 100, the offense here charged is within the forgery offense, and the ten-year statute applies to forgery. The same is true of the offense defined in Art. 54[illegible] Sec. 32, supra. So the offense is not barred.

Lastly, the appellant complains of the action of the trial court in overruling his application for probation. No error is shown. Probation is discretionary with the trial court. McClane v. State, 343 S. W. 2d 447.

We have carefully considered and examined all of the remaining contentions of appellant, along with the numer-

ous informal bills of exception, and find no error reflected in any of them.

Finding the evidence sufficient to sustain the verdict of the jury and finding no reversible error, the judgment is affirmed.

McDONALD, *Judge*

(Delivered October 3, 1962)

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4. Opinion of the Court of Criminal Appeals of Texas in This Case Upon Rehearing (R. 153-156)

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

Opinion on Appellant's Motion for Rehearing

Appellant contends that the contract of sale and the assignment which is set out and referred to in the indictment as "a certain instrument in writing" relate to the sale of real estate, and are in violation of the provisions of Art. 6137b, V.A.P.C. This statute prohibits any person subdividing real estate from using the subdivision's description in any deed of conveyance or contract of sale delivered to a purchaser unless and until a map or plat has been duly authorized and filed for record with the clerk of the County Court of the county where the real estate is situated. He further contends that the statutory prohibition with a penalty imposed renders the contract of sale and the assignment void. Therefore, the assignment on which this prosecution rests could not be made the basis of forgery and the appellant could not be guilty as charged.

At first attention is directed to the provisions of Art. 1009, V.A.P.C., to the effect that upon indictment under Chapter 2 of Title 14, it shall be no defense that the instrument was in law, either as to substance or form, void.

The first paragraph in the contract of sale consists of an application to purchase real estate from the Veterans Land Board of Texas. The contract is subject, among other conditions, to the commitment of the Board not being below the contract price. Next, the contract is subject to the defects, if any, in the title. The assignment depends on certain terms and conditions, and is also subject to acceptance by the Board.

It is apparent from the contract that it is an executory contract to convey and not such a contract of sale per se as passes either legal or equitable title. The assignment is in the same condition. Currie v. Burgess, 120 S.W. 2d 788; Tashneck v. Hefner, 282 S.W. 2d 298. Art. 1137 h, supra, relates only to deeds and contracts of sale delivered to a purchaser. Therefore, the assignment set out and designated in the indictment as "a certain instrument in writing" is not void because it does not come within the terms of the aforesaid article.

It is insisted that there is a fatal variance between the allegations of the indictment and the proof because the description of the real estate is violative of Art. 1137 h, supra, which renders the contract of sale and its assignment void. This contention is controlled by the holding herein that said article is not applicable to the instruments here in question.

It is strenuously resurged that the evidence is insufficient to support the conviction on the ground that there is no showing that Doris Sayles, the notary, had any fraudulent intent when she certified that Mireles had appeared before her in the making of the acknowledgment.

In addition to the disposition made of this contention in the original opinion, it is further concluded that without

regard to whether Doris Sayles innocently, or while acting as a principal, certified that Mireles appeared before her as a notary, the evidence is sufficient to warrant the finding that the appellant had the intent to defraud and was a principal in the commission of the offense charged.

The motion for rehearing is overruled.

BELCHER, *Judge.*

(Delivered January 9, 1963.)

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

Concurring Opinion on Motion for Rehearing

Appellant's counsel has tendered to this Court as an exhibit to his motion for rehearing a stipulation executed by all the prosecutors involved and joined in by himself in which it is agreed that he did in fact except to the action of the court in overruling his objections and exceptions to the charge and that such exception was, through inadvertence and oversight, omitted from the certificate of the court.

There is no escape from the conclusion that if we considered such stipulation we would in effect be permitting an amendment to a bill of exception long after the statutory time for filing the same has expired and would be overruling a long line of authorities which hold that such may not be done.

In the recent case of Gonzales v. State, 297 S.W. 2d 144, we held that the district clerk was without power to antedate or attempt to file back objections and exceptions to

the court's charge. Therefore we cite Ortiz v. State, 53 S.W. 2d 58, as authority for the rule that this might not be done even with the consent of the trial court. The effect of such holding is that a bill of exception must be perfected under Article 760d, V.A.C.C.P., within 90 days after the giving of notice of appeal, and that once that time has elapsed, no bills filed or perfected thereafter will be considered.

In Tindol v. State, 239 S.W. 2d 396, we said:

> "In this connection attention is directed to the rule that a bill of exception becomes an unamendable instrument once the appeal is perfected and the time for filing such bills has expired, because the trial court is then without jurisdiction to make any order whatsoever in the case. For this Court to allow the filing of amendments or additions to bills in cases on appeal would so complicate and delay the adjudication of a cause of action that this Court might never remain current with its docket. This we must do in order to properly perform our function in the judicial system."

See also Crawford v. State, 305 S.W. 2d 362, and Smith v. State, 313 S.W. 2d 291, and cases there cited.

I join in the overruling of the motion for rehearing.

Morrison, *Judge*.

(Delivered January 9, 1963).

Minutes of Court of Criminal Appeals

AUSTIN, TEXAS

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

SECOND MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION

February 13, 1963:

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that the said motion be and the same is hereby in all things overruled.

APPENDIX B

Statutes

Title 14, Chap. 2, Articles 1006, 1007, 1008, 1010, and 1011, Texas Penal Code 1925:

Article 1006. *Forgery of patents, etc.*

Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or in any way aids, assists, advises, or encourages the false making, altering, forging, or counterfeiting of any . . . transfer, assignment, release, conveyance, or title paper, or acknowledgment, or proof of record, . . . in relation to or affecting lands, or any interest in lands in this State, with the intent to make money or other valuable thing thereby . . . or with any fraudulent intent whatever, shall be deemed guilty of forgery and be punished by imprisonment in the State penitentiary at hard labor not less than five nor more than twenty years.

Article 1007. *False certificate by officers*

If any person authorized by law to take the proof of acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title of lands in this State, wilfully and falsely certify that such proof or acknowledgment was duly made, or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person, though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 1006 of this chapter.

Article 1008. *Knowingly uttering forged instruments*

Every person who knowingly utters, publishes, passes, or uses, or who in any way aids, assists in or advises the uttering, publishing, passing or using as true and genuine any false, forged, altered or counterfeited . . . acknowledg-

ment or proof for record or certificate of record, belonging to or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever . . . in any way relating to, or having any connection with land, or any interest in land in this State, with the intent mentioned in article 1006 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like manner as is provided in article 1006 of this chapter. And the filing or causing or directing to be filed, or causing or directing to be recorded, in the General Land Office of the State, or in any office of record or in any court in this State, or the sending through the mails or by express, or in any other way, for the purpose of filing of record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers, or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing and using within the meaning of this article.

Article 1010. *Proof and allegations*

Upon indictment under this chapter, to warrant a conviction, it shall only be necessary to prove that the person charged took any one step, or did any one act or thing in the commission of the offense, if from such step, act or thing any of the intentions hereinbefore mentioned, or any other fraudulent intention, may be reasonably inferred; nor shall it be any defense to a prosecution under this chapter, that the matter, act, deed, instrument or thing was in law, either as to substance or form, void, or that the same was not in fact used for the purpose for which it was made or designed; and it shall only be necessary in an indictment under this chapter to state with reasonable certainty the act constituting the offense, and charge, in connection therewith, in general terms, the intention to defraud, without naming the person or persons it was intended to defraud. On trial of such indictment, it shall be sufficient and shall not be deemed a variance if there

appears to be an intent to defraud the United States, or any State, Territory, county, city, town or village, or any body corporate, or any public officer in his official capacity, or any co-partnership, or member thereof, or any particular person.

Article 1011. *Rules in forgery applicable*

The rules prescribed in the preceding chapter relative to the offense of forgery, so far as the same are applicable, shall apply to the various offenses enumerated in this chapter.

Texas Code of Criminal Procedure,
Article 781d. Article II

Article II. *Probations*

Sec. 2. The courts of the State of Texas having original jurisdiction of felony criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any felony, crime or offense except murder, rape, and offenses against morals, decency, and chastity, where the maximum punishment assessed the defendant does not exceed ten years imprisonment, and where the defendant has not been previously convicted of a felony, to suspend the imposition or the execution of sentence and may place the defendant on probation for the maximum period of the sentence imposed or, if no sentence has been imposed, for the maximum period for which the defendant might have been sentenced, or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. Any such person placed on probation shall be under the supervision of such court.

Constitution of Texas. Article 1.
§ 14. Double Jeopardy

Sec. 14. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

APPENDIX C

Excerpt from Petitioner's Brief Below on Appeal to the Court of Criminal Appeals of Texas from the District Court (p. 18)

"Fifth Point of Error

"The Court erred in summarily overruling defendant's application for probation without permitting defendant an opportunity to offer evidence thereon, and particularly in view of the Court's qualification of defendant's Bill of Exception in refusing to certify, without permitting any evidence, that the grounds relied upon by defendant in his motion and in his bill were not certified by the Court as facts, but as merely allegations of the defendant, and in refusing to hear defendant's application for probation as provided by the Acts of 1957, 55th Legislature, p. 466, Ch. 226 (known as Vernon's Code of Criminal Procedure, Article 781d); and in so doing the trial court acted arbitrarily and abused its discretion, and denied defendant a fair hearing under said statute, and denied him due process of law and the equal protection of the law under the Constitutions of the State of Texas and of the United States."

Excerpts from Petitioner's Second Motion for Rehearing Below to the Court of Criminal Appeals of Texas

. . . . . .

"The judgment of this Court which finds the appellant, B. R. Sheffield, a principal in the forgery, without a jury finding to that effect, denies this defendant a trial by jury in a felony case, and denies him the equal protection of the law and due process of law, under the Constitution of Texas, and the Constitution of the United States and Amendments thereto.

"Appellant now at the earliest possible time, when this Court holds, without according him a jury trial, that he is guilty as a principal in the alleged forgery, raises and presents this Federal Question of equal protection of the

law due process, and of his right to have a jury; and not this appellate court, decide the issue as to whether he was a principal in the alleged forgery. (R. I, p. 158)

* * * * *

"The judgment of this Court, for the first time on re-hearing, holding defendant guilty as principal in forging the acknowledgment of Alfonso Mireles to the instrument in writing in this case, places the appellant twice in jeopardy for the same offense, and convicts him of an offense of which he has been heretofore tried and acquitted, and denies him the equal protection of the law, and due process of law under the Constitution of Texas, and the Constitution of the United States, and Amendments thereto.

"Appellant now raises this Federal Question at the first opportunity. (R. I, p. 159)

"5. This Court erred in refusing to reverse this case because of the error of the trial court in refusing to hear and consider appellant's petition for probation. Appellant says that the refusal to hear such application was arbitrary and unreasonable, and denied him equal protection of the law, and due process of law as guaranteed by the Constitution of Texas, and the Constitution of the United States and Amendments thereto, all of which is shown by defendant's Bill of Exceptions No. 10." (*Ibid.*)